**No. 87371**

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**IN THE**
**SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**LAMONT C. KEMP,**

**Appellant.**

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**Appeal from the Circuit Court of Boone County, Missouri**
**The Honorable Gene Hamilton, Judge**

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# RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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**JEREMIAH W. (JAY) NIXON**
**Attorney General**

**KAREN L. KRAMER**
**Assistant Attorney General**
**Missouri Bar No. 47100**
**P. O. Box 899**
**Jefferson City, MO 65102**
**(573) 751-3321**
**(573) 751-5391 fax**
karen.kramer@ago.mo.gov
**Attorneys for Respondent**

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## JURISDICTIONAL STATEMENT

This appeal is from a conviction for felonious restraint, §565.120, RSMo 2000, and unlawful use of a weapon, §571.030, RSMo 2000, obtained in the Circuit Court of Boone County, and for which appellant was sentenced to concurrent terms of seven and four years, respectively. The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence. ***State v. Lamont Kemp***, No. WD 64501 (Mo.App.W.D., November 8, 2005). It denied appellant's motion for rehearing on December 20, 2005.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On January 31, 2006, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, Lamont Kemp, was charged by indictment as a prior and persistent offender with felonious restraint, unlawful use of a weapon, and receiving stolen property (LF 3, 13-14). On March 3, 2004, this cause went to trial before a jury in the Circuit Court of Boone County, but a mistrial was declared because evidence of an uncharged bad act was adduced in violation of a motion in limine (LF 6; Tr. 67-68). On March 12, 2004, this cause again went to trial before a jury in the Circuit Court of Boone County, the Honorable Gene Hamilton presiding (LF 7).

Appellant does not challenge the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

James Westerfield, a real estate appraiser, had an office at 307 Locust Street in Columbia (Tr. 131). Sometime during the night of September 7 and 8, 2003, someone broke into his office and took three guns, a .22 caliber semiautomatic stainless steel pistol, a .357 Ruger six-shot revolver, and a .40 caliber Smith & Wesson semiautomatic (Tr. 131-132). The guns were valued in the aggregate at $1,408 (Tr. 134).

On the morning of October 11, 2003, Michael and Laura Johnson were at their home at 4300 Mesa Drive in Boone County (Tr. 138, 145). At about 8:30 in the morning, Mrs. Johnson was watching TV and her husband was asleep when they heard a loud knocking at the door and a woman screaming and yelling for help (Tr. 139, 145). Mrs. Johnson peeked out the living room window and saw a half-naked woman standing at the door, screaming

"Help me." (Tr. 145-146). The woman had a small white green nightgown around her waist, but was naked from the waist up (Tr. 146). Mrs. Johnson got her husband and then called 911 (Tr. 146).

Mr. Johnson hurriedly dressed and went to the front door, but did not see anyone (Tr. 139). Mr. Johnson asked where the woman went, and Mrs. Johnson said that the woman had run down the street (Tr. 139). Mr. Johnson ran down the street and saw an older woman, subsequently identified as Jackie Washington, in a sort of nightgown, naked from the waist up, trying to keep herself covered (Tr. 139). The woman was frantic, and kept tripping and falling to the ground (Tr. 139-140). The woman was upset, crying, shaking, and having trouble breathing (Tr. 140). The woman said frantically that her boyfriend had been holding her hostage in her apartment at gunpoint all night and would not let her leave (Tr. 140).

Mr. Johnson brought the woman up to the house and called the police (Tr. 140). Washington kept crying and shaking and could not catch her breath (Tr.140). Washington fell several times trying to walk to the back entrance of Johnson's apartment (Tr. 140-141). Once in the apartment, Washington was crying, bending down and taking deep breaths (Tr. 146). She looked very frantic, upset, and emotional, and kept saying "Oh, God, help me. Please help me." (Tr. 146). Washington said that her boyfriend, appellant, had held her in the basement bathroom since 9:00 the previous night at gunpoint (Tr. 147). She said the gun appellant used was a silver pistol (Tr. 141). She said that she had just escaped when she came banging on the Johnsons' door (Tr. 147). Washington said that appellant had a gun in the back of his pocket and he had her sitting down in the bathroom (St.Exh. 1). Washington

said that appellant kept waving the gun around and that it had been going on all night (St.Exh. 1).

Sergeant Jerry Greene responded to the scene (Tr. 161-162). He and about four or five other officers approached Washington's residence; they believed appellant was still inside the residence and tried to make contact with him (Tr. 162). They knocked on the door and called the residence as well (Tr. 162). This continued for an hour without receiving any response from inside the house (Tr. 163, 169). Eventually, 20 tactical officers and 15 crisis negotiators responded to the scene (Tr. 163). After about an hour, Officer Garon Holman was able to speak with appellant on the phone (Tr. 168-169). After speaking with Officer Holman, appellant came out of the house (Tr. 163-164, 169).

Officer Robert Kiesling also responded to the scene (Tr. 150-151). Kiesling took statements from the Johnsons and Washington and eventually was able to go inside Washington's residence (Tr. 151-152). There, Kiesling located three handguns (Tr. 152). He found a loaded .40 caliber Smith & Wesson and an unloaded .22 caliber handgun in the trash can in the kitchen (Tr. 153-157). He also found a loaded .357 revolver (Tr. 154, 156). All three guns were later determined to have been stolen (Tr. 159).

After the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of felonious restraint, unlawful use of a weapon, and receiving stolen property (LF 53-55; Tr. 215). The court sustained appellant's motion for new trial as to Count III, receiving stolen property, and stayed sentencing on the other two counts until Count III was resolved (LF 8). The state ultimately entered a nolle prosequi as to Count III

(LF 10; Tr. 237). Having previously found appellant to be a prior and persistent offender (Tr. 30), the court then sentenced appellant to seven years on Count I and four years on Count II, said sentences to run concurrently (LF 10, 70-73; Tr. 251).

The Court of Appeals, Western District, affirmed appellant's conviction and sentence on direct appeal. ***State v. Lamont Kemp***, No. WD 64501 (Mo.App.W.D., November 8, 2005). It denied appellant's motion for rehearing on December 20, 2005. On January 31, 2006, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court.

## ARGUMENT

### I.

**The trial court neither erred nor abused its discretion in admitting into evidence State's Exhibit 1, the recording of the victim's statements to the 911 operator, because appellant's confrontation rights were not violated by admission of the statements in that the statements were not testimonial.**

Appellant contends that the victim's statements made to the 911 operator were not admissible under ***Crawford v. Washington*** as they were testimonial, the victim did not testify at trial, and appellant never had the opportunity to cross-examine the victim about her statements. However, because the statements were excited utterances and made under circumstances that objectively indicate that the primary purpose of the statements was to enable the police to meet an ongoing emergency, the statements were not testimonial and thus were admissible.

**A. Standard of review.**

A trial court is vested with broad discretion over questions of relevancy and the admissibility of evidence. ***State v. Dunn***, 817 S.W.2d 241,245 (Mo.banc 1991). A reviewing court will not interfere unless the trial court's discretion has been clearly abused. ***Id***. Such an abuse exists only where the court's ruling clearly offends the logic of the circumstances or appears arbitrary and unreasonable. ***State v. Strughold***, 973 S.W.2d 876,887 (Mo.App.E.D. 1998). In matters involving the admission of evidence, the Court of Appeals reviews for prejudice, not merely error, and will reverse only if error was so

prejudicial that it deprived the defendant of a fair trial. ***State v. Hayes***, 113 S.W.3d 222,226 (Mo.App.E.D. 2003). Potential confrontation clause violations are also subject to harmless error analysis. ***United States v. Chapman***, 356 F.3d 843,846 (8th Cir. 2004).

**B. Relevant facts.**

Appellant filed a motion in limine to prevent the state from introducing the out-of-court statements of the victim, Jacqueline Washington, as inadmissible hearsay (LF 20-22). Immediately prior to the beginning of appellant's first trial (which ultimately ended in a mistrial (LF 6; Tr. 67-68)), the state announced that it had been unable to serve Jacqueline Washington with a subpoena and intended to introduce Washington's statements to the 911 operator under the excited utterance exception to the hearsay rule (Tr. 12). Appellant argued that the statements in question did not meet the test for excited utterances (Tr. 12). The trial court listened to State's Exhibit A, an already-redacted version of the 911 call, and determined that parts of the recording would be allowed in (Tr. 17-18).

Specifically, the trial court said as follows:

> [T]he Court would state there is a lot of information that's on there that comes from the lady across the street who was making the telephone call, and it ends up being double hearsay because she's turning around and asking the victim questions and then repeating that to the 9-1-1 operator.
>
> And the only part that I'm going to allow in is the part where you can hear the victim identifying herself, who she is, and then the second part where she made some direct statements on the telephone call as to what had happened to

> her in the house, the fact that it happened all night, that there was a gun involved, et cetera . . .
>
> The Court is allowing those statements in and only those from State's Exhibit A because of the fact that the Court believes that those are excited utterances in the fact that a foundation, as I understand it, will be laid that this victim came running down the street, half-naked, screaming and yelling, and it was on this basis that the 9-1-1 call was made.

(Tr. 17-18).

Judge Hamilton, in ruling on whether the statement was an excited utterance, further noted that there was information on State's Exhibit A, such as the victim's heavy breathing, that established that it was an excited utterance, but that that portion of the CD would not go to the jury (Tr. 19-20). Rather, it could only be used by the trial court to determine whether it was an excited utterance (Tr. 20).

Appellant's trial ended in a mistrial on March 3, 2004 (Tr. 67-68). Subsequently, the United States Supreme Court issued its opinion in ***Crawford v. Washington***. On March 11, 2004, appellant filed an additional motion in limine to keep the statements out as they were allegedly inadmissible under ***Crawford v. Washington*** on the grounds that Washington was not unavailable and there had been no prior opportunity to cross-examine the victim (LF 28-32).

In discussing the new motion in limine, the trial court stated that it wanted to hear the question asked immediately before the response that it had allowed in (Tr. 72). The entire, unredacted 911 call was played for the court (Tr. 74).

The trial court ruled that the statements made to Mike and Laura Johnson and to the 911 operator were not testimonial and thus were not excludable under ***Crawford v. Washington***. (LF 8; Tr. 79). The court found that the statements were excited utterances and were admissible as an established hearsay exception (LF 8; Tr. 78). The statements were corroborated by the condition of the victim, by the fact that she was running down the street, naked from the waist up, in a frantic emotional state, crying, shaking, emotionally distraught and experiencing breathing trouble (LF 8). There was not time to reflect, premeditate, or fabricate the statements made (LF 8). The statements to the Johnsons were not made to the police or any governmental authority (LF 8; Tr. 79).

While the statements made to the 911 operator were made to a government employee, they were not obtained for the purpose of later testimony, but rather to establish a need for medical help and to assist with information for the safety of the responding officers (LF 8). The court noted that the questions asked by the 911 operator were "in order to determine who was in the house, whether the person in the house was armed, what the situation had been, in order to advise the officers of what to do when they arrived there, how many officers were needed, what the situation was." (Tr. 79). The court found that the statements "were not elicited by the 911 dispatcher for the purpose of testimony at a trial at a later date but rather

were for the purpose of finding out the situation in an emergency situation at the time." (Tr. 79).

The trial court thus overruled appellant's motion in limine (Tr. 80). Appellant asked for and received a continuing objection regarding the motion in limine (Tr. 80-81).

During the state's case-in-chief, the following was played for the jury over appellant's objection:

> Laura Johnson (LJ): It's ok.
>
> 911 Operator (911): 911. What is your emergency?
>
> LJ: Um, yes, we have . . .
>
> 911: What's your name ma'am?
>
> Jackie Washington (JW): Jackie.
>
> LJ: Huh?
>
> JW: Jackie.
>
> LJ: Jackie.
>
> JW: Washington.
>
> LJ: Washington.
>
> 911: What's his name . . . what's the boyfriend's name?
>
> LJ: What's your boyfriend's name?
>
> JW: Lamont Kemp.
>
> LJ: Lamar Kemp?
>
> 911: Ok.

JW: . . . went in there. He got this gun in the back of his pocket. (Inaudible)

Michael Johnson: What type of gun?

911: Did he have her tied up or?

LJ: Did he have you tied up or just locked in the bathroom?

JW: No, he had, he had the gun on me. He had me sittin' down with him like this while he's wavin' the gun around talkin' about he's seein' people. This been goin' on all night.

LJ: Did you hear that?

911: Ok. Yeah.

(St.Exh. 1; Tr. 178-180).

**C. The victim's statements were not testimonial and thus were not inadmissible under *Crawford v. Washington.***

Appellant contends that Jacqueline Washington's statements made to the 911 operator and admitted at trial were testimonial and thus inadmissible under ***Crawford v. Washington***. The basis for appellant's claim is the United States Supreme Court decision in ***Crawford v. Washington***, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Whereas under ***Ohio v. Roberts***, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), an unavailable witness's statement against a defendant was admissible if the statement bore "adequate indicia of reliability," ***Crawford*** determined that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution

actually prescribes: confrontation." ***Id.*** at 1374**.** Simply put, testimonial statements are no longer admissible unless the witness takes the stand and the defendant has had a prior opportunity to cross-examine the witness.

It is important to note, however, what the United States Supreme Court did not do in ***Crawford:***

(1) The Supreme Court did not forever abrogate the indicia of reliability test or any of the firmly established hearsay exceptions as they are applied to non-testimonial out-of-court statements. Thus, if a statement is non-testimonial, courts should carry on as before in analyzing and determining the admissibility of such statements.

(2) The Supreme Court *did not* adopt a definition of "testimonial" to be applied by the lower courts. In fact, the Supreme Court specifically stated that it would "leave for another day any effort to spell out a comprehensive definition of testimonial," fully aware that this would create uncertainty. ***Id.*** at 1374. The Supreme Court noted that "[v]arious formulations of this core class of 'testimonial' statements exist," citing to the petitioner's brief, ***White v. Illinois,*** 502 U.S. 346 (1992), and an amici curiae brief submitted by the National Association of Criminal Defense Lawyers. ***Crawford***, 124 S.Ct. at 1364. However, the Supreme Court did not adopt any of these formulations. Nor did the Supreme Court compile a list of what constituted testimonial statements, except to say that the term applies, "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." ***Id.*** at 1374. The Supreme Court noted that these were

"the modern practices with closest kinship to the abuses at which the Confrontation Claus was directed." ***Id.***

**1. *Davis v. Washington*.**

A little over two years later, the United States Supreme Court revisited the issue of what constituted testimonial statements in ***Davis v. Washington***, 126 S.Ct. 2266 (2006). In ***Davis,*** the Supreme Court examined two cases: ***Davis v. Washington***, which, like the present case, involved statements made to a 911 operator, and ***Hammon v. Indiana***, a case which involved statements made to police officers who responded as a result of a 911 call.

In ***Davis***, the victim, Michelle McCottry, called 911, but the call was terminated before anyone spoke. ***Id.*** at 2270-2271. The 911 operator called back and determined that McCottry was involved in a domestic distrubance with her former boyfriend, Adrian Davis. ***Id.*** at 2271. McCottry reported that Davis was there, "jumpin on [her] again." ***Id.*** The operator asked where she was and she reported she was in a house. ***Id.*** The operator asked if any weapons were involved, and McCottry said, no, that Davis was using his fists. ***Id.*** The operator asked if Davis had been drinking, and McCottry said that he was not. ***Id.*** The operator told McCottry to stay on the line, and then asked for Davis's name. ***Id.*** McCottry said that her assailant was Adrian Martell Davis, and then said that he had run out the door. ***Id.*** As the conversation continued, the 911 operator gathered more information from McCottry, including Davis's birthday and that he had come to the house to "get his stuff." ***Id.*** McCottry described the context of the assault, and the 911 operator told her that the police were on their way. ***Id.*** Officers arrived four minutes later. ***Id.***

Davis was charged with felony violation of a domestic no-contact order. ***Id.*** McCottry did not appear to testify and, over Davis's objection, based on the Confrontation Clause, the trial court admitted the recording of McCottry's statements to the 911 operator. ***Id.***

The Supreme Court again noted that, under ***Crawford***, admission of testimonial statements was not permissible unless the witness was unavailable and the defendant had a prior opportunity for cross-examination. ***Id.*** at 2273. This applies only to testimonial statements, for "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." ***Id.***

The Supreme Court acknowledged that it had not endorsed any particular definition of "testimonial" statements, but did say that they included statements taken by police officers in the course of interrogations. ***Id.*** The Supreme Court determined that the situations in ***Davis*** and ***Hammon*** required them to determine more precisely which police interrogations produce "testimony." ***Id.***

The Supreme Court held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Id.*** at 2273. Statements are testimonial when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Id.*** at 2273-2274.

Specifically, the Supreme Court noted that inquiries of a police operator in the course of a 911 call[1] are an interrogation in one sense, but not in a sense that qualifies under any conceivable definition. When, in ***Crawford***, the Supreme Court stated that interrogations by law enforcement officers fell "squarely within [the] class" of testimonial hearsay, the Court had in mind "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." ***Id.*** at 2276. The product of such an interrogation, whether written down in a signed statement or committed to the memory of the officer, constituted a solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Davis, supra***, at 2276.

A 911 call, however, is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance. ***Id.*** In examining the statements in ***Davis,*** and comparing them with those in ***Crawford***, the Court noted that in ***Davis***, the statements were about events as they were happening, not describing past events that had occurred hours before. ***Id.*** In addition, the Court found that any reasonable listener would recognize that McCottry was facing an ongoing emergency and was "plainly a call for help against bona fide physical threat." ***Id.*** Third, the nature of what was asked and

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[1]The Court noted that while 911 operators are not themselves law enforcement officers, they may be considered agents of law enforcement officers, and for the purpose of the opinion in ***Davis*** (but without deciding the point), the Court considered their acts to be acts of the police. ***Id.*** at 2274, n. 2.

answered in ***Davis*** was such that the elicited statements were necessary to be able to resolve the present emergency, and this was true even of the operator's effort to establish the identify of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. ***Id.*** at 2276. Finally, the Court noted a difference in the level of formality, in that in ***Crawford***, the speaker was responding calmly at the station house to a series of questions, whereas in ***Davis***, McCottry's frantic answers were provided over the phone in a less-than-tranquil, and potentially unsafe environment. ***Id.*** at 2277.

Based on this, the Supreme Court held that the circumstances of McCottry's interrogation objectively indicated that its primary purpose was to enable police assistance to meet an ongoing emergency. ***Id.***[2]

To contrast, the Supreme Court found the statements in ***Hammon v. Indiana*** to be testimonial. In ***Hammon v. Indiana***, police responded to the Hammon residence on a

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[2]The Court also noted that while statements made in a 911 call may be nontestimonial, the purpose of the call may evolve and later statements made during the call may be testimonial. ***Id.*** at 2277. Thus, trial courts may find it necessary to redact portions of a 911 call if some of the statements are testimonial and some are not testimonial. ***Id.*** In the present case, it should be noted that the trial court engaged in considerable redaction of the 911 call. The trial court listened to all three versions of the 911 recording, considered the caselaw and, particularly ***Crawford***, and ultimately redacted the tape from over 12 minutes down to around 41 seconds.

"reported domestic disturbance." ***Id.*** at 2272. When they arrived, they found Amy Hammon sitting on the porch. She appeared frightened, but told them that nothing was the matter. ***Id.*** Amy Hammon allowed the officers in the house where they found a gas heater in the corner of the living room with flames coming out and broken glass on the floor in front of it. ***Id.*** One officer remained in the kitchen with Hershel Hammon, who while admitting an argument, denied that it became physical. ***Id.*** The other officer talked with Amy Hammon in the living room; Hershel tried to intervene but was rebuffed. ***Id.*** The officer asked Amy what had happened and, after hearing her story, had her fill out and sign a battery affidavit, in which Amy admitted that Hershel had broken the furnace, shoved her down on to the floor into the broken glass, hit her in the chest and threw her down, broke their lamps and phone, attacked their daughter, and damaged their van so Amy could not leave. ***Id.*** .

Hershel was charged with domestic battery, but Amy did not appear at trial. ***Id.*** One of the officers testified as to what Amy had told him and authenticated her affidavit. ***Id.*** The affidavit was admitted as a present sense impression, and Amy's statements were admitted as excited utterances. ***Id.***

Unlike in ***Davis***, the Court found in ***Hammon*** that the statements taken from Amy were part of an investigation into possibly criminal past conduct, noting that the testifying officer expressly acknowledged this. ***Id.*** at 2278. There was no emergency in progress; in fact, Amy told the officers when they arrived that everything was fine. Thus, when the officers were questioning Amy, they were not trying to determine what was happening, but rather what had happened. ***Id.*** The Court also noted that Amy's interview, while not as

formal as that in ***Crawford***, was relatively formal. Her statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." ***Id.*** The statements took place some time after the described events were over. ***Id.***

Comparing the two cases, the Supreme Court noted the following: in ***Davis***, the statements were taken when McCottry was alone, unprotected by police, and in immediate danger from Davis; in ***Hammon***, the statements were delivered well after the danger she described, and in the presence and protection of the police. ***Id.*** at 2279. In ***Davis***, McCottry was seeking aid; Amy Hammon was talking about something that had happened some time ago. ***Id.*** And of course, Amy actually executed an affidavit in order to establish that the events had occurred. ***Id.***

**2. Analysis under *Davis v. Washington*** and ***Crawford***

The question in the present case, of course, is whether the statements Washington made to the 911 operator which were admitted at trial were testimonial or non-testimonial. Looking at the totality of the circumstances surrounding the statements in question, Washington's statements were non-testimonial. Specifically, the totality of the circumstances surrounding the statements in question objectively indicate that the primary purpose of the statements was to enable police assistance to meet an ongoing emergency. ***Davis, supra***, at 2273. As the statements were non-testimonial, they were admissible without violating appellant's confrontation rights under ***Crawford***.

Washington's statements were made in response to an ongoing emergency and were made to procure police assistance for that emergency. While appellant insists this was not an ongoing emergency, as Washington was allegedly safe inside the Johnsons' apartment (App.Br. 25), the fact remains that immediately prior to the call and Ms. Washington's statements therein, she had been pounding on the Johnsons' door, screaming for help (Tr. 139, 145-146), she had run down the street, naked from the waist up, frantic, and tripping and falling to the ground as she ran (Tr. 139-140, 146), and when Mr. Johnson brought her back to their house, Washington kept crying and shaking, could not breathe and kept trying to take deep breaths, and kept saying, "Oh, God, help me. Please help me." (Tr. 139-140, 146). The evidence clearly shows that Washington was in the throes of an emergency situation and was seeking help.

When Michael Johnson took her into his apartment, they went in the back door, inferably to avoid being seen, because appellant was in the apartment directly across the street from the Johnsons. On the 911 recording, Ms. Washington is heard breathing heavily and sobbing and is described by Laura Johnson as being "really scared." Indeed, Judge Hamilton, in making his ruling on what was admissible, noted Ms. Washington's obvious emotional distress (Tr. 19-20).

While appellant believes the emergency was over because Washington was in her neighbors' apartment, it is apparent that everyone involved, from Washington to the Johnsons to the 911 operator felt that this was still a dangerous situation. Unlike in ***Hammon***, police were not already on the scene to provide protection and prevent anything

further from happening. Appellant was immediately across the street, in Washington's apartment, with a gun, and had been smoking crack (St.Exh. A). Appellant had chased Washington and had been out on the back porch (St.Exh. A). When asked if appellant knew where she was, Washington responded that appellant was "probably knocking on the doors." (St.Exh. A). Johnson brought Washington into his apartment through the back door, inferably so as not to be seen by appellant in the apartment across the street from the Johnsons (Tr. 140). The 911 operator kept the Johnsons on the phone specifically "in case you guys see him or he tries to do something else." (St.Exh. A). Being across the street from an obviously unbalanced individual, perhaps on crack cocaine, who possessed a gun and had held someone at gunpoint for eight hours up until minutes prior to the phone call still constitutes an emergency situation, and an argument to the contrary is untenable.

Other courts, post-***Davis***, have examined whether excited utterances made immediately *after* the crime were non-testimonial under ***Davis.*** For example, in ***Frye v. State***, 850 N.E.2d 951 (Ind.Ct.App. 2006), Ashley Chastain drove her boyfriend, Frye, over to the home of the victim, Timothy Royal, because Frye wanted to confront Royal about allegedly sleeping with Chastain (which Royal had not done). ***Id.*** at 953. When they arrived, Chastain ran through Royal's house and out the back door, and was not present when Frye threatened Royal with two handguns. While the encounter between Frye and Royal went on, a police officer was dispatched to a different location because of a "distraught female." ***Id.*** When Officer Harper arrived at that location, he found Chastain, distraught, crying, and hysterical.

***Id.*** Chastain told Officer Harper that Frye had two handguns on him; these guns were later found by police who arrived at Royal's residence and found Frye. ***Id.*** at 954.

As Chastain claimed she would take the 5th Amendment if called at trial, Officer Harper testified as to what Chastain had told him. ***Id.*** Frye argued that Chastain's statements were testimonial. The Indiana Court of Appeals held that the statements were excited utterances, based on the fact that a startling event had occurred, that Chastain was distraught, crying, and hysterical, and her statements related to the event, which was occurring or had occurred immediately beforehand. ***Id.*** at 954-955. The ***Frye*** court acknowledged the United States Supreme Court's opinion in ***Hammon v. Indiana***, the companion case to ***Davis***, and held that Chastain's statements fit within the nontestimonial definition provided by the Supreme Court in ***Hammon***: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Id.*** at 955, n. 2. The court also noted that the unstructured interaction between the officer and Chastain was not the equivalent of a formal or informal police inquiry such that it would constitute a police interrogation under ***Crawford***. ***Id.*** at 955.

In ***State v. Reardon***, 2006 WL2196458, slip. op. No. L-05-1275 (Ohio Ct.App. August 4, 2006), Reardon and several others forced their way into an occupied house in order to steal $19,000 in insurance settlement money. ***Id.*** at*1. One occupant escaped and called 911. ***Id.*** When Reardon and the others heard police sirens, they fled. ***Id.***

When police arrived at the house, the scene in the victims' kitchen "was emotional and chaotic." ***Id.*** One of the officers tried to get coherent information from the victims, who were in an agitated state. ***Id.*** At some point, one of the victims, Lauren Bair, blurted out, "It's that fucker Albert Quinn, and * * * it's that fat fucker Reardon with the lazy eye down at the end of the street." ***Id.*** At the time Bair made the statement, she was still hysterical and the general atmosphere was still very chaotic. ***Id.*** This episode occurred within three to five minutes after the police arrived. ***Id.***

The Ohio Court of Appeals applied ***Davis*** to the facts in the case before them and found Bair's statement to be "clearly non-testimonial." ***Id.*** at *3. The Court noted that it was an ongoing emergency because the armed suspects had fled into the neighborhood, and the officers needed to ensure their own safety and the safety of the neighborhood. ***Id.*** Furthermore, the Court did not find "the required level of formality" to produce a testimonial statement. ***Id.*** The scene was emotionally charged and chaotic, and when Bair blurted out her statement, she was hysterical. ***Id.*** Given the agitation of Bair, the lack of tranquility at the scene, and the insecurity of knowing there were armed violent men loose in the neighborhood, the Court found that Bair's statement was non-testimonial as its primary purpose was to assist the police in resolving an ongoing emergency. ***Id.***

In ***Vinson v. State***, 2006 WL 2291000 (Tex.App.-Hous. (1 Dist.), August 10, 2006), an officer responded to a report by a dispatch operator of a possible emergency at appellant's apartment. ***Id.*** at *1. When the officer arrived at the apartment, approximately 10 to fifteen minutes after an initial 911 hang-up call was made, he found Lalania Hollimon at the door

with recent injuries to her face. ***Id.*** She appeared visibly shaken and in pain. ***Id.*** When the deputy asked, "What happened?" Holliman replied that she had been assaulted by her boyfriend. ***Id.*** at *2. The deputy began to question her about the assault, when a black male came from the living room and told Hollimon to tell the truth. ***Id.*** The deputy asked who that was, and Hollimon said that was her boyfriend, his name was Vinson, and he was the person who assaulted her. ***Id.***

The Texas Court of Appeals found Hollimon's statements admissible under ***Davis***. The Court noted that when the deputy asked, "What happened" he knew that only minutes before, a woman in that same apartment had been yelling for police assistance and now she appeared injured. ***Id.*** at *7. The Texas Court found the statement "tantamount to his having asked whether an emergency existed or whether Hollimon needed assistance," and thus the deputy's question, and Hollimon's response, was to ascertain if there was an ongoing emergency. ***Id.*** When Vinson entered the room, the deputy's questions as to who he was elicited a statement necessary to resolve the present emergency, rather than to simply learn what had happened in the past. ***Id.*** at *8.

As ***Frye, Reardon***, and ***Vinson*** demonstrate, it is not necessary that the speaker literally be describing something that is happening as they speak. While appellant asserts that Washington's statements technically described past events (App.Br. 25), so did the statements in ***Frye, Reardon***, and ***Vinson***. What is necessary is that an emergency situation exist and the person be making the statements to seek police assistance. In the present case, an emergency situation did exist, and contrary to appellant's argument (App.Br. 25), Ms.

Washington's dangerous situation was not over. Appellant was immediately across the street, in Washington's apartment, armed, possibly high on crack, and looking for Washington. Washington clearly felt it was an ongoing situation; she was still scared. The Johnsons clearly felt it was an ongoing situation; Johnson brought Washington in through the back door of the apartment. The 911 operator clearly felt it was an ongoing situation; she expressly said she was keeping them on the line in case they saw appellant or he tried to do something.[3] And of course, Judge Hamilton, considering the totality of the circumstances, thought that Washington's statements were made for the purpose of obtaining police assistance:

> The 9-1-1 questions asked by the operator, the Court believes were elicited in order to determine who was in the house, whether the person in the house was armed, what the situation had been, in order to advise the officers of what to do when they arrived there, how many officers were needed, what the situation was, ***and were not elicited by the 9-1-1 dispatcher for the purpose of testimony at trial at a later date but rather were for the purpose of finding out the situation in an emergency situation at the time.***

(Tr. 79). (emphasis added).

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[3]The fact that the police sent five to six officers to the scene initially, followed up by 20 tactical officers and 15 crisis negotiators would also tend to indicate an ongoing emergency.

Thus, as in ***Davis, Frye, Reardon***, and ***Vinson***, there was an ongoing emergency in this case. In addition, a reasonable listener would recognize that there was an ongoing emergency. As noted above, Washington, the Johnsons, and the 911 operator certainly all believed that there was still danger, and a reasonable listener, hearing that appellant had been using drugs, was armed, had been chasing Washington, and was either right across the street or was currently searching for her, would recognize that there was an ongoing emergency. While appellant points out that Washington indicated that she did not need an ambulance (App.Br. 26), this only indicates that Washington was not injured. It did not indicate that the emergency was not ongoing.

Another factor considered by the ***Davis*** court is the nature of what was asked and answered. Viewed objectively, the information provided by Ms. Washington was that which was necessary for police to resolve the present situation. The police needed to know where appellant was, who he was, and with what he was armed. In ***Davis***, the speaker identified the defendant, what he had done, whether he was armed, and where he was. This is no more or less than what Ms. Washington did when she told the 911 opertor that her boyfriend, appellant, had held her at gun point in her apartment and that she had just fled, and that he was armed with a handgun.

Appellant contends that the present case is more comparable to ***Hammon*** than it is to ***Davis*** (App.Br. 27). The primary basis for appellant's contention is that Ms. Washington described something that happened in the past, whereas the victim in ***Davis*** allegedly described things as she was experiencing them currently (App.Br. 27). There is a *substantial*

difference, however, between reporting something that had not immediately happened at a time when an emergency no longer existed, as in ***Hammon***, and something that had been ongoing until mere minutes before it was reported, as in the present case. The statements made in ***Frye, Reardon***, and ***Vinson*** were all made after the fact, as well, but, like the present case, were made immediately afterward and while an emergency situation still existed.

In fact, then, the present case is more like ***Davis, Frye, Reardon***, and ***Vinson*** than it is ***Hammon.*** The present case, like the prior four cases, involve excited utterances made in the immediate aftermath of the crime, and for the purpose of obtaining help. ***Hammon*** involved a relatively formal statement, taken by the police for the express purpose of establishing what had happened, and not for obtaining police assistance, as it was no longer needed. Thus, the present case is nothing like ***Hammon***.

Additionally, the lack of formality of the interview is another reason why the present case is more like ***Davis***. Ms. Washington's statements were provided over the phone, in an environment that was not necessarily tranquil nor safe. Ms. Washington's statements were made while she was still under the stress of the event, namely appellant's holding her at gunpoint and her escape accomplished just minutes before. Moments before making her statement, Ms. Washington was running down the street, naked from the waist up, screaming for help, tripping and stumbling over herself in her panic. The Johnsons noted, during the 911 call, that she appeared "really" scared and was "hysterical", and Washington could be heard panting and crying on the 911 tape.

It is certainly within the realm of possibilities that a 911 call, or portions thereof, might be testimonial statements. But as the court held in ***People v. Moscat***, 77 N.Y.S.2d 875 (N.Y. City Crim.Ct. 2004):

> A 911 call for help is essentially different in nature than the "testimonial" materials that ***Crawford*** tells us the Confrontation Clause was designed to exclude.
>
> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.
>
> * * *
>
> Moreover, a 911 call can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows. Many 911 calls are made while an assault or homicide is still in progress. Most other 911 calls are made in the *immediate* aftermath of the crime.
>
> Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a "witness" in future legal proceedings; she is usually trying simply to save her own life.

***Moscat***, 777 N.Y.S.2d at 879-880.

Moreover, when a statement is an excited utterance, it is difficult to perceive circumstances under which such a statement would be testimonial. ***People v. Corella***, 18

Cal.Rptr. 3d 770 (2004). This is because excited utterances are "made without reflection or deliberation due to the stress of excitement" and that such statements "made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." ***Id.*** The statements made in ***Frye, Reardon***, and ***Vinson*** were all deemed excited utterances and all were found to be non-testimonial. The trial court found Washington's statements to be excited utterances as well (as shall be discussed more fully in Point II).

In short, Washington's statements to the 911 operator that were admitted at trial did not implicate "the principal evil at which the Confrontation Clause was directed," namely "[i]nvolvement of government officers in the production of testimony with an eye towards trial." ***Crawford,*** 124 S.Ct. at 1367, n. 7. The 911 operator was not seeking to produce and preserve testimonial evidence with an eye toward trial. ***Crawford, supra.*** Washington's statements were made because she was afraid due to the immediate danger from which she had just fled, not because of an intent to "bear witness" in contemplation of legal proceedings. ***See Davis, supra.*** As such, her statements were not testimonial.

Ultimately, of course, the question is whether the trial court abused its discretion in determining whether a given statement is testimonial or non-testimonial. An abuse of discretion exists when the trial court's decision is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. ***State v. Raines***, 118 S.W.3d 205, 209 (Mo.App.W.D. 2003). If reasonable persons can disagree about the propriety of the trial court's decision, the trial court did not abuse its discretion. ***Id.***

As is apparent from the record here, the trial court engaged in extremely careful consideration herein. It listened to all three versions of the recording, considered the caselaw and, in light of ***Crawford***, listened again to the recording to determine what was said immediately prior to the statements which ultimately were allowed in (Tr. 72-75), and finally redacted the tape from over 12 minutes down to around 41 seconds. It simply cannot be said that the trial court's ruling was arbitrary, let alone that it indicated a lack of careful consideration.

**3. Appellant suffered no prejudice.**

Even if the trial court did abuse its discretion in determining whether the statements at issue were testimonial or non-testimonial, appellant is not entitled to relief because he cannot show prejudice. When reviewing questions involving the admission of evidence, the appellate courts review for prejudice, not mere error. ***State v. Moore***, 88 S.W.3d 31, 36 (Mo.App.E.D. 2002). Appellants must show that there was a reasonable probability that without the admission of the evidence, the verdict would have been different. ***Id.*** Potential confrontation clause violations are also subject to harmless error analysis. ***United States v. Chapman***, 356 F.3d 843,846 (8th Cir. 2004).

In the present case, even if the statements to the 911 operator were testimonial (and thus inadmissible), there was not a reasonable probability that the verdict would have been different. The Johnsons' testimony regarding Washington's excited utterances to them still would have established, even without the 911 tape, that appellant held the victim at gunpoint for over eight hours. Michael Johnson and Laura Johnson testified that at about 8:30 in the

morning, they heard a loud knocking at the door and a woman screaming and yelling for help (Tr. 139, 145). Mrs. Johnson peeked out the living room window and saw a half-naked woman standing at the door, screaming "Help me." (Tr. 145-146). The woman had a small white green nightgown around her waist, but was naked from the waist up (Tr. 146). Mrs. Johnson got her husband and then called 911 (Tr. 146).

Mr. Johnson hurriedly dressed and went to the front door, but did not see anyone (Tr. 139). Mr. Johnson asked where the woman went, and Mrs. Johnson said that the woman had run down the street (Tr. 139). Mr. Johnson ran down the street and saw an older woman, subsequently identified as Jackie Washington, in a sort of nightgown, naked from the waist up, trying to keep herself covered (Tr. 139). The woman was frantic, and kept tripping and falling to the ground (Tr. 139-140). The woman was upset, crying, shaking, and having trouble breathing (Tr. 140). The woman said frantically that her boyfriend had been holding her hostage in her apartment at gunpoint all night and would not let her leave (Tr. 140). This statement was made to Michael Johnson before he and the woman returned to the Johnson's home (Tr. 140).

Mr. Johnson brought the woman up to the house and called the police (Tr. 140). Washington kept crying and shaking, and could not catch her breath (Tr.140). Washington fell several times trying to walk to the back entrance of Johnson's apartment (Tr. 140-141). Once in the apartment, Washington was crying, bending down and taking deep breaths (Tr. 146). She looked very frantic, upset, and emotional, and kept saying "Oh, God, help me. Please help me." (Tr. 146). Washington said that her boyfriend, appellant, had held her in

the basement bathroom since 9:00 the previous night at gunpoint (Tr. 147). She said the gun appellant used was a silver pistol (Tr. 141). She said that she had just escaped when she came banging on the Johnsons' door (Tr. 147).

While appellant appears to also contend that the statements made by Washington to the Johnsons are testimonial, this position cannot be maintained. The statements made to Michael and Laura Johnson are not testimonial for the simple reason that Michael and Laura Johnson are not government agents. ***Crawford*** clearly contemplates that a testimonial statement is one made to a government agent.

The Supreme Court in ***Crawford***, in addressing the question of testimonial statements, first noted that the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, that is, examination of witnesses in private by judicial officers. ***Crawford, surpa,*** at 1359, 1363. The Supreme Court noted that "[v]arious formulations of this core class of 'testimonial' statements exist." ***Id.*** The defendant in ***Crawford***, in his brief, considered as testimonial the following: *ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. ***Id.*** at 1364. In ***White v. Illinois***, the Supreme Court considered "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." ***Crawford,*** 124 S.Ct. at 1364. The ***Crawford*** court also cited to the amicus brief filed by the National Association of Criminal Defense Lawyers, which apparently defined testimonial statements

as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Id.*** at 52.

Rather than adopting any of these, the Supreme Court merely noted that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction." The Supreme Court, in examining this common nucleus, emphasized the significance of the necessity of government involvement in a testimonial hearsay statement. Indeed, one of the reasons the Court ultimately held that statements taken in the course of a police interrogation were testimonial was that "[i]nvolvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse" ***Id.*** at 1367, n. 7, and "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." ***Id.*** at 1365.

The Johnsons were not governmental officers or agents. Any statements made to them simply do not implicate the dangers that the Supreme Court sought to address in its holding in ***Crawford***.

Appellant, however, argues that Washington's statements in the apartment, as heard by the Johnsons, were still testimonial because they were elicited by the Johnsons and by the 911 operator (App.Br. 14). Appellant has not identified the questions that the Johnsons asked which prompted Washington's responses, and in any event, the fact that the statements may have been made in response to a question by the Johnsons is of no account because the Johnsons are not government actors. This was not a governmental interrogation and was not

an attempt to adduce or produce evidence for later use at trial. Washington, by telling the Johnsons anything, did not contemplate that she was making a formal statement for later use at trial.

As for being elicited by the 911 operator, this is of no account if, as in this case, the information is elicited for the purpose of assisting the police in responding to the emergency. As already discussed, Washington's statements and the questions asked by the 911 operator were for the purpose of obtaining help for Washington and obtaining necessary information so that the police might safely respond. Statements made for this purpose are not testimonial. And even if the statements made in the apartment were deemed testimonial because of the involvement of the 911 operator, under no circumstances were the statements made to Michael Johnson outside of the apartment testimonial. Since Washington's excited utterance to Johnson, that her boyfriend had been holding her hostage in her apartment at gunpoint all night and would not let her leave (Tr. 140), was not testimonial and therefore admissible, appellant was not prejudiced by the cumulative statements to Laura Johnson and the 911 operator, even if these latter statements were testimonial.

**D. Conclusion.**

In the present case, Washington's statements to a 911 operator were not intended to be a formal statement, and there is no reason, given the circumstances under which they were made, that a reasonable person would believe that was the purpose of the statements. The 911 operator was not doing the equivalent of taking a formal statement or a deposition, or attempting to perpetuate a statement for later use at trial. Washington's statements were

made and elicited in order to obtain the help of police during an emergency situation, and were geared to providing necessary information to the officers for their own safety and the safety of all those involved, including appellant. The statements thus were not testimonial and were not barred by ***Crawford*** or the Confrontation Clause. The trial court did not abuse its discretion in admitting the statements.[4]

**II.**

**The trial court did not abuse its discretion in admitting Washington's statements under the excited utterance exception to the hearsay rule because they were made immediately following a startling event while Washington was still under the immediate**

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[4]Respondent notes that appellant spent a substantial portion of his brief arguing about the availability of Washington, no doubt because if the statements in question *are* testimonial, then they are only admissible if Washington was unavailable *and* appellant had a prior opportunity to cross-examine. As respondent is unaware of any prior opportunity for appellant to cross-examine Washington, this fact alone would keep the statements out, if indeed they were testimonial. Thus, respondent, while not conceding any issue regarding unavailability, sees no need to address whether or not Washington was unavailable. Respondent does note, however, that appellant did not contest Washington's unavailability in his original appellate brief.

**and uncontrolled dominion of the senses, and there was corroborating evidence independent of the statement that a startling event had occurred.**

Appellant contends that even if Washington's statements were non-testimonial, they were still inadmissible because they did not fall within the excited utterance exception to the hearsay rule. Contrary to appellant's assertions, Washington's statements did qualify as excited utterances because they were made immediately following a startling event while Washington was still under the immediate and uncontrolled dominion of the senses and there was evidence, independent of her statements, that a startling event had occurred, particularly that Washington was seen running half-naked down her street at 8:30 in the morning, hysterical and frantically calling for help.

**A. Standard of review.**

A trial court's decision to admit hearsay evidence is limited to a determination of whether the admission was an abuse of discretion. ***State v. Mattic***, 84 S.W.3d 161, 169 (Mo.App.W.D. 2002). The trial court's judgment is reviewed for prejudice, not mere error, and reversal is warranted only if the error was so prejudicial that it deprived the defendant of a fair trial. ***State v. Edwards***, 31 S.W.3d 73, 77 (Mo.App.W.D. 2000).

**B. Relevant facts.**

Prior to his first trial, appellant filed a motion in limine objecting to the admission of Washington's statements as excited utterances (Tr. 11; LF 20-22). The trial court ruled as follows, after listening to the 911 recording provided by the state (State's Exh. A):

> [T]he only part that I'm going to allow in is the part where you can hear the victim identifying herself, who she is, and then the second part where she made some direct statements on the telephone call as to what had happened to her in the house, the fact that it happened all night, that there was a gun involved, et cetera, et cetera, et cetera.
>
> The Court is allowing those statements in and only those from State's Exhibit A because of the fact that the Court believes that those are excited utterances in the fact that a foundation, as I understand it, will be laid that this victim came running down the street, half-naked, screaming and yelling, and it was on that basis that the 9-1-1 call was made.
>
> And this is all assuming that the State lays a foundation as to who is speaking on the tape and lays sufficient foundation that I could find that it was an excited utterance at the time.

(Tr. 18).

The first trial ended in a mistrial (Tr. 67). Prior to the second trial, ***Crawford v. Washington*** was handed down, and appellant moved to keep Washington's statements out under ***Crawford*** (Tr. 72). The trial court again listened to the 911 recording (Tr. 75), and ruled that it would allow Washington's statements made immediately after the incident because they were excited utterances (Tr. 78). The trial court said that it believed that the statements made in the 911 call and to the Johnsons were not testimonial in nature but rather

"were true excited utterances." (Tr. 79). Thus, the trial court overruled appellant's motion in limine (Tr. 80).

The evidence at trial showed that about 8:30 on the morning of October 11, 2003, Michael and Laura Johnson heard a loud knocking at the door and a woman screaming and yelling for help (Tr. 138-139, 145). Mrs. Johnson peeked out the living room window and saw a half-naked woman standing at the door, screaming "Help me." (Tr. 145-146). The woman had a small white green nightgown around her waist, but was naked from the waist up (Tr. 146).

Mr. Johnson hurriedly dressed and went to the front door, but did not see anyone (Tr. 139). Mr. Johnson asked where the woman went, and Mrs. Johnson said that the woman had run down the street (Tr. 139). Mr. Johnson ran down the street and saw an older woman, subsequently identified as Jackie Washington, in a sort of nightgown, naked from the waist up, trying to keep herself covered (Tr. 139). The woman was frantic, and kept tripping and falling to the ground (Tr. 139-140). The woman was upset, crying, shaking and having trouble breathing (Tr. 140). The woman said frantically that her boyfriend had been holding her hostage in her apartment at gunpoint all night and would not let her leave (Tr. 140).

Mr. Johnson brought the woman up to the house and called the police (Tr. 140). Washington kept crying and shaking, and could not catch her breath (Tr.140). Washington fell several times trying to walk to the back entrance of Johnson's apartment (Tr. 140-141). Once in the apartment, Washington was crying, bending down and taking deep breaths (Tr. 146). She looked very frantic, upset, and emotional, and kept saying "Oh, God, help me.

Please help me." (Tr. 146). Washington said that her boyfriend, appellant, had held her in the basement bathroom since 9:00 the previous night at gunpoint (Tr. 147). She said the gun appellant used was a silver pistol (Tr. 141). She said that she had just escaped when she came banging on the Johnsons' door (Tr. 147). Washington said that appellant had a gun in the back of his pocket and he had her sitting down in the bathroom (St.Exh. 1). Washington said that appellant kept waving the gun around and that it had been going on all night (St.Exh. 1).

Appellant objected to Washington's statements as hearsay (Tr. 140, 146).

**C. Washington's statements were excited utterances.**

The "excited utterance" exception to the hearsay rule applies when a startling event or condition occurs and the statement is made while the declarant is under the stress of excitement caused by the event and has not had the opportunity to fabricate. ***State v. Kemp***, 919 S.W.2d 278 (Mo.App.W.D. 1996). The statement must relate to the startling event. ***Id.***

The essential test for admissibility of an excited utterance is neither the time nor place of its utterance but whether it was made under such circumstances as to indicate it is trustworthy. ***State v. Edwards***, 31 S.W.3d 73, 78 (Mo.App.W.D. 2000); ***State v. Strong***, 142 S.W.3d 702, 718 (Mo.banc 2004). The rationale of this hearsay exception is that where the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event, the utterance may be taken as expressing the true belief of the declarant. ***Edwards, supra.*** An excited utterance is inherently trustworthy because the startling nature of the event is speaking through the person instead of the person speaking

about the event. ***Bynote v. National Supermarkets, Inc.***, 891 S.W.2d 117, 122 (Mo.banc 1995). "Because the statement is spontaneous and made under the influence of events, the statement is assumed trustworthy because it is unadorned by thoughtful reflection." ***Id.*** Courts examine four factors in deciding whether or not an excited utterance exists: (1) the time between the startling event and the declaration; (2) whether the declaration is in response to a question; (3) whether the declaration is self-serving; and (4) the declarant's physical and mental condition at the time of the declaration. ***Id.*** No one factor necessarily results in automatic exclusion; all should be considered in determining whether the declaration was an excited utterance. ***Id.*** The event and the statement need not be simultaneous so long as the statement is provoked by the excitement of the event and the declarant is still under the control of that excitement. ***State v. Jackson,*** 872 S.W.2d 123, 125 (Mo.App.E.D. 1994), citing ***State v. White***, 621 S.W.2d 287, 295 (Mo.1981).

In ***State v. Edwards***, 31 S.W.3d 73, 77 (Mo.App.W.D. 2000), a woman, in an excited voice, called 911 and reported that she needed the police and an ambulance. The 911 operator asked what was going on, and the woman said she had been cut. The operator asked who cut her, and the woman identified the defendant, Hosea Edwards. The operator asked if he was still there, what he looked like, and what he was wearing, and the woman provided relevant answers to those questions. This Court found that all of the woman's statements on the tape qualified as excited utterances. ***Id.*** at 78-79. Specifically, this Court noted that the tape of the 911 call itself demonstrated that the caller was not calm, but rather was catching her breath and speaking with emotion.

Just as the victim's statement in ***Edwards***, Washington's statements herein qualified as excited utterances. They were made minutes after a startling event, her escape from her boyfriend who had held her at gunpoint for 8 hours. She was clearly experiencing a startling event; the testimony was unequivocal that she was frantic, hysterical, and panicked. She pounded on the Johnsons' door, screaming for help. She ran half-naked down the street. She was so overcome, she kept tripping and falling. She could not catch her breath. She was crying, shaking, and having trouble breathing. She kept saying, "Oh God, help me. Please help me." The trial court, in ruling as it did, specifically noted these facts, particularly the victim's heavy breathing on State's Exhibit A (Tr. 18-20).

Appellant, however, appears to take issue with the fact that Washington's statements were in response to questions. The claim that an excited utterance cannot be in response to a question has been rejected. ***See State v. Bowler***, 892 S.W.2d 717, 721 (Mo.App.E.D. 1994); ***State v. Boyd***, 669 S.W.2d 232, 234 (Mo.App.E.D. 1984) (both holding that the fact that an excited utterance came in response to a question does not detract from the excited nature of the statement). Indeed, most of the excited utterances on the 911 call of the victim in ***Edwards*** were also in response to questions.

Appellant's reliance on ***State v. Hook***, 432 S.W.2d 349 (Mo. 1968) is misplaced as the case is distinguishable on its facts. In that case, Hook and his fifteen-year-old stepdaughter were discovered parked in an orchard in the middle of the night and appeared to have been about to engage in sexual intercourse, due to their state of dress and the fact they were found in the back of the station wagon. A police officer took the girl to his police

car and asked her if they had been having intercourse, what her relationship was to Hook, and what her age was. The state tried to admit these statements as part of the res gestae. In rejecting the admissibility of the statements, this Court relied on the fact that the girl had not sought out the patrolman to make complaint or seek help. Even when the officer stopped the vehicle as it tried to drive away, the girl remained silent. She spoke only in response to the officer's leading questions. This Court specifically said "it is the victim's reaction to the event in question rather than the influence of the police investigation on which the hearsay statements must depend for their admissibility." ***Id.*** at 353. In ***Hook***, the girl's statements clearly were not made under the stress or excitement of a startling event.

In the present case, unlike ***Hook***, Washington clearly was under the stress or excitement of a startling event that had occurred only minutes before. Her statement to Michael Johnson was a free flowing response to the prospect of help arriving and was made for that purpose, and there is no evidence that it was prompted by any questions whatsoever. As for her statements to the 911 operator, the tape reveals that Washington was still in a hysteric state from her ordeal. Her statements were not self-serving, and were only intended to obtain help. There was no indication of reflective thought. Indeed, Washington did not directly answer the 911 operator's questions. Washington volunteered that appellant had a gun. When the 911 operator asked (through Laura Johnson), "Did he have you tied up or just locked in the bathroom," Washington went into an unsolicited description of the night's activities: "No, he had, he had the gun on me. He had me sittin' down with him like this

while he's wavin' the gun around talkin' about he's seein' people. This been goin' on all night." (St.Exh. 1).

Appellant also argues that the statements could not qualify as excited utterances because "there was no independent evidence that there was ever a startling event to prompt" Ms. Washington's statements, other than the statements themselves (App.Br. 40).

There appear to be only two published cases in Missouri that deal with this issue. In ***State v. Post***, 901 S.W.2d 231, 234-235 (Mo.App.E.D. 1995), the Missouri Court of Appeals, Eastern District, held that for an excited utterance to be admissible, there must be evidence independent of the utterance that supports a finding that an exciting event occurred. The ***Post*** court adopted the reasoning of the Texas Supreme Court in ***Truck Insurance Exchange v. Michling***, 364 S.W.2d 172 (Tex. 1963) and applied the standard that there must be *some* independent proof that the event *could* have occurred[5].

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[5]Appellant, in his brief, states that the ***Post*** court held that the standard is that the exciting event *did* occur, not just that it *could* have occurred (App.Br. 39). In fact, the ***Post*** court examined language from a Michigan case, ***People v. Burton***, which said that there must be independent evidence that the event did occur, not that it could have occurred, and a Texas case, ***Truck Insurance Exchange v. Michling***, 3645 S.W.2d 172, which applied a less stringent standard that *some* independent proof that the event *could* have occurred is necessary. The ***Post*** court stated: "We believe the Texas court approach to be sound." ***Post,*** 901 S.W.2d at 235. Hence, it appears that the ***Post*** court adopted the standard that there be

Similarly, in ***State v. Kemp***, 919 S.W.2d 278 (Mo.App.W.D. 1996), the Court of Appeals, Western District, adopted the reasoning in ***Post*** and determined that there had to be some independent proof of the startling event.

Both ***Post*** and ***Kemp*** determined that there was no independent proof of the startling event because, absent the declarant's excited utterance, there was no evidence of a startling event. In ***Post***, the only proof of an alleged startling event was the declarant's statement in a phone call to a friend that her husband had been beating her. ***Post***, 901 S.W.2d at 235. Although the person to whom she made the phone call testified that the declarant was "hysterical," the ***Post*** court deemed this "conclusory" and observed that the witness had not actually observed the declarant and that the state did not elicit what this conclusion was based on. ***Id.*** The ***Post*** court also noted that the declarant's statement indicated reflective thought. ***Id.***

In ***Kemp***, the only proof that there was a startling event was the declarant's statement to the police when they arrived that her husband had beaten her with a belt. While a 911 call was made, there was no evidence as to who made the call, the nature of the call, or who or what was the object of the call. ***Id.*** When officers arrived, they saw the victim and defendant, but there were no signs of physical abuse. ***Id.***

Such is not the situation in the present case. Even without Washington's excited utterances, there was evidence that a startling event occurred, given that Washington was

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some independent proof that the event *could* have occurred, not that it *did* occur.

witnessed fleeing, half-naked and stumbling over herself, down the street in broad daylight. Both Michael and Laura Johnson testified that Washington was in extreme distress – crying, shaking, falling, struggling to breathe**,** and begging for help. Moreover, there was evidence corroborating what Washington said occurred. Appellant demonstrated consciousness of guilt by holing up in the house and refusing to come out until he was finally "talked out" by an officer. Handguns were found hidden in the trashcan in the house.

Appellant, in arguing that there wasn't independent evidence, points out that the Johnsons had not observed anything happening to Washington and that Washington had no signs of physical abuse. But it is not necessary that the state prove independently that the startling event occurred. The state need only have *some* independent evidence that the startling event *could* have occurred. ***See Post***.

In that respect, this situation is very much analogous to *corpus decliti* cases. Extrajudicial admissions or statements of a defendant are not admissible in the absence of independent proof of the *corpus delicti* – the commission of an offense. ***State v. Madorie***, 156 S.W.3d 351, 355 (Mo.banc 2005). However, absolute proof of the *corpus delicti* independent of a defendant's statement is not required. ***Id.*** All that is required is evidence of circumstances tending to prove the *corpus delicti* corresponding with the confession. ***Id.*** *Slight corroborating facts* are sufficient to establish the *corpus delicti*. ***Id.*** In other words, *standing alone*, a defendant's extrajudicial confession is insufficient to prove the *corpus delicti* but *may* be considered along with the corroborating circumstances to establish the

*corpus delicti*. ***State v. Garrett***, 829 S.W.2d 622, 626 (Mo.App. S.D. 1992) (emphasis added).

Similarly, in the case of excited utterances, it is not necessary that the state absolutely prove the startling occurrence absent the excited utterance. However, the state cannot rely solely on the excited utterance to prove the startling occurrence. But if there are corroborating facts (or other independent evidence), that support a finding that a startling event *could* have happened, this is sufficient.

As demonstrated above, there were corroborating facts and independent evidence in the present case. Moreover, Washington's statements were clearly made while she was still under the immediate stress of her escape from captivity and without opportunity for her to reflect. The trial court did not abuse its discretion in admitting the statements as excited utterances. Appellant's claim is without merit and should be denied.

## CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-5391 Fax
karen.kramer@ago.mo.gov
Attorneys for Respondent

## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 12,122 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of August, 2006.

Margaret Johnston
Office of State Public Defender
3402 Buttonwood
Columbia, MO 65201

JEREMIAH W. (JAY) NIXON
Attorney General

KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
(573) 751-5391 fax

karen.kramer@ago.mo.gov
Attorneys for Respondent

## RESPONDENT'S APPENDIX

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